BOOK REVIEWS.

THE JUDICIARY AND THE PEOPLE. By FREDERICK N. JUDSON. New Haven: YALE UNIVERSITY PRESS. 1913. pp. 270.

It is to be hoped that the attendance of the students of the Yale Law School upon the lectures published in this little volume, was not of the perfunctory sort which often marks the attitude of even law school men towards lectures that do not count towards a degree. These lectures were worthy of serious consideration by every one who had the opportunity of listening to them; as now they are worthy of careful study by every citizen to whom they are made available in book form. They are the result of a long and honorable experience at the bar. They have no rhetorical pyrotechnics. Throughout they are characterized by sanity of thought, lucidity of statement, and judicial-mindedness.

The first three lectures are mainly historical. Mr. Judson recounts the influences which led to the adoption of our written Constitution with its sharp separation of the judicial power from the other departments of government. He finds no warrant for the assertion that our judges were guilty of usurping authority, when they nullified acts of legislation as unconstitutional. With Chief Justice Marshall, he believes they were bound by their oaths of office to declare any legislative act null and void which plainly contravened a constitutional provision.

The discussion of the recall of judges and of judicial decisions in the fourth lecture is admirable. Fair and candid in his statement of the reasons for and against the policy, free from all partisanship in his views, and calm in his argument, Mr. Judson leads up very persuasively to the conclusion that the policy "misconceives the fundamental theory of our political system," and "would necessarily be unwise in its exercise."

The concluding lecture is devoted to the defects of our judicial procedure and the remedies therefor. We have not space for a review of these in detail, and must be content with stating briefly Mr. Judson's conclusions. Most of our procedural defects are due to unwise legislation. They are to be cured by retracing our steps; by abolishing our voluminous legislative codes of practice; by enlarging judicial discretion and by dignifying the office of judge.

Francis M. Burdick.

CERTAINTY AND JUSTICE: Studies of the Conflict between Precedent and Progress in the Development of the Law. By FREDERIC R. COUDERT. New York and London: D. APPLETON & Co. 1913, pp. vi: 320.

This is a very readable book, and one who begins the reading of it is likely to read to the end. It consists of a series of essays upon topics which have in recent years attracted the attention of both lawyers and laymen. It is written in a clear, simple, non-technical style and illumined with interesting and apposite illustrations. The subjects discussed include the doctrine of *stare decisis,* or the nature and scope of judicial precedent; the nature and effect of written constitutions, including the possibilities of constitutional development as illustrated by recent decisions upholding legislation affecting

the right of trial by jury, or indictment by grand jury; criminal procedure, including a suggestive summary of the fundamental differences between the French and Anglo-American systems, and a consideration of the question whether our old constitutional provision against self-crimination should not be abrogated or modified; and the rule of reason, as applied in the decisions under the Sherman Anti-Trust Law. There are also interesting chapters devoted to a study of the status of the inhabitants of our newly-acquired possessions, Porto Rico and the Philippine Islands; of aliens under the laws of Continental Europe, England and America; and of extradition considered with respect to political crimes.

Throughout his book the author keeps in mind the modern attitude of criticism and restiveness with respect to our laws and judicial system, and all the subjects are discussed with that attitude in view. His own attitude may be defined as that of a progressive conservative —that is, while he welcomes and approves wholesome and helpful criticism, and points out evils and defects which we should strive to remedy, he recognizes that these are not fundamental and inherent in the system itself and the remedies he suggests are not revolutionary. One might wish that he had gone further in emphasizing the merits of the common law system, and had not gone so far in making certain concessions which to the superficial reader may convey a false impression. On the other hand, his evident fairness and catholicity of view may secure for his book a larger number of readers both among sociologists and sound lawyers.

In his first chapter Mr. Coudert comments upon the conflict between certainty and justice. His opinion seems to be that this conflict is serious and irrepressible, that in proportion as the law is definite and certain, it must fail to meet the demands of justice, and that the doctrine of *stare decisis* is an outgrowth of a desire to attain certainty at the expense of justice. But certainty in the law—the kind of certainty which is needed and useful—does not require that the court should slavishly follow precedent. It simply requires that the court in its decisions should adhere to some general rule or principle of justice, morality or sound public policy applicable to groups of cases properly classified. If prior decisions are in conflict with such general rule or principle, the court may and does disregard them; and clearly, in so far as such general rule is based upon a sound principle of justice, morality or public policy, a consistent adherence to it, so far from being in conflict with justice, is promotive of it. It is true that in some cases the court must sometimes follow prior decisions involving a general rule based upon a principle which is not now regarded as sound. But we must not lose sight of the fact that the primary function of a court is to decide upon the rights of the parties before it and not to formulate a rule for the future, and justice as well as a sound public policy requires that the rights of the parties before the court should be determined with respect to the law as it was understood and accepted when the transactions occurred out of which the rights arose. If the court could be empowered to separate its function of deciding upon existing rights from that of formulating a rule for the determination of future rights, it would be more free to disregard precedent.

In his last chapter Mr. Coudert states his final conclusion, to the effect that our laws and judicial system are sound in principle and

that what is primarily needed and perhaps all that is needed for the improvement of our administration of justice is, in addition to some simplification of our procedure, improvement in the character and training of both bench and bar. This is wholesome doctrine and cannot be too much emphasized. But in connection with this our author makes an important concession; namely, that our modern law is "out of harmony with real life." This is similar to the complaint of the sociologist and the Progressive, for which, it is submitted, there is little justification. It is based principally, if not wholly, upon the judicial decisions with respect to legislation enacted in the exercise of the police power. But, as pointed out by a writer of an interesting article in a recent number of the Columbia Law Review (April, 1913), during the 25 years from 1887 to 1911, the United States Supreme Court rendered 560 decisions involving the validity of state statutes or other form of state action under the Federal Constitution. In the case of all these decisions, except three, the Court sustained the validity of state legislation, including labor legislation, anti-trust legislation, liquor and cigarette legislation, pure food legislation, regulation of railways and other corporations, laws restricting the freedom of contracts, etc. In this State the *Ives Case* has been singled out as conclusive evidence that our Court of Appeals is out of harmony with the spirit of the times. In the year 1911, the year in which the decision in the *Ives Case* was rendered, the Court of Appeals rendered decisions in 749 cases, of which only two or three other decisions besides the *Ives Case* involved any question as to the police power, and no serious general criticism has been made as to the decisions in any of these cases except the *Ives Case*. Assuming for the purpose of argument that the federal court was wrong in the three cases above referred to, and the Court of Appeals was wrong in the *Ives Case*, we have a record of three mistakes in 25 years for the United States Supreme Court in the police power cases, and of one mistake for the Court of Appeals out of the total number of 749 cases decided in the year 1911. Such a record undoubtedly demonstrates the fallibility of human judges, but it hardly justifies the wholesale condemnation of the judges and of the system under which they are administering law.

If it may be conceded that the criticisms of sociologist and Progressive have quickened among lawyers a consciousness of the law's defects and a more earnest zeal for reform, it must also be conceded that the time has arrived when their strident denunciations serve no useful purpose, and when we may again be permitted to indulge in praise of the common law without risk of falling into the error of regarding it as *ratio scripta*, or the perfection of human reasoning. The truth is, as pointed out by Mr. Coudert, that our common law system, with all its faults (and what of human origin is there without faults?) is one of the greatest achievements of the Anglo-Saxon race —an achievement comparable to the achievements of other nations in art, literature and philosophy.

George F. Canfield.

A TREATISE ON THE FEDERAL INCOME TAX LAW OF 1913. By THOMAS GOLD FROST. Albany: MATTHEW BENDER & COMPANY. 1913. pp. xii, 242.

A TREATISE ON THE LAW OF INCOME TAXATION UNDER FEDERAL AND STATE LAWS. By HENRY CAMPBELL BLACK. Kansas City, Mo.: VERNON LAW BOOK COMPANY. 1913. pp. xvi, 403.